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No. 97-419

In the Supreme Court of the United States

OCTOBER TERM, 1997

DARRELL CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *Feres* doctrine (*Feres* v. *United States*, 340 U.S. 135 (1950)), bars this suit under the Federal Tort Claims Act brought (i) on behalf of an Operation Desert Storm veteran's daughter who was born with congenital defects, and (ii) by the veteran himself for negligent post-discharge failure to warn veterans of Operation Desert Storm that their offspring allegedly had an increased risk of serious genetic damage due to chemical exposure.

2. Whether the judgment of the court of appeals rests on independent and sufficient grounds that are not challenged in the petition for a writ of certiorari.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 116 F.3d 476 (Table). The opinion of the district court (Pet. App. 3a-8a) is reported at 974 F. Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1997. The order denying rehearing was entered on June 10, 1997. Pet. App. 12a. The petition for a writ of certiorari was filed on September 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Darrell Clark, a former serviceman, along with his wife Shanna and on behalf of their daughter Kennedi, brought this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, seeking compensation for injuries that allegedly resulted from Darrell Clark's exposure to drugs and chemical toxins during his service in the United States Army. Petitioners alleged that Kennedi Clark's birth defects resulted from Darrell Clark's exposure to drugs and various chemicals during his military service in the Persian Gulf War. Pet. 4; Pet. App. 3a-4a.

On the government's motion, the district court dismissed petitioners' claims for lack of subject matter jurisdiction. The district court identified four independent bases for dismissal. First, the claim was untimely because petitioners filed suit before their administrative remedies were exhausted. Pet. App. 4a-5a. Second, the court held that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars petitioners' claims. Pet. App. 5a-6a. Third, the district court held that the claims were barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). Pet. App. 7a. Finally, the court concluded that the claims fall within the wartime exception to the FTCA, 28 U.S.C. 2680(j). Pet. App. 8a. The district court entered judgment for the United States, dismissing petitioners' claims with prejudice. *Id.* at 9a.[1]

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[1] The district court later modified its judgment to specify that the dismissal was without prejudice to the extent that any of petitioners' claims were being reconsidered in the administrative petition for reconsideration then pending with the United States Air Force. Pet. App. 10a-11a.

The court of appeals affirmed the district court's judgment in a per curiam opinion, expressly adopting the district court's reasoning. Pet App. 1a-2a. The panel also rejected petitioners' request for rehearing. *Id.* at 12a.

ARGUMENT

Further review is not warranted in this case because there is no conflict among the courts of appeals on the issue presented in the petition, and because the judgment below stands on three additional grounds not challenged in the petition.

1. a. Contrary to petitioners' submission (Pet. 7-9), there is no conflict among the courts of appeals as to whether the *Feres* doctrine bars a Federal Tort Claims Act suit involving a claim that a service member's exposure to allegedly harmful substances resulted in injury to the service member's child. The cases cited by petitioners in support of their claim of a circuit conflict concerned the availability of an FTCA action for negligent prenatal care to a pregnant servicewoman that resulted in injury to the fetus or newborn child. Pet. 7-8. Those cases have no bearing here. The circuits that allow such a claim do so because they conclude that a physician owes an independent duty to the unborn child, who, as a civilian, is not subject to the *Feres* doctrine. See, *e.g.*, *Romero by Romero* v. *United States*, 954 F.2d 223, 226 (4th Cir. 1992) (child's injury "was caused when the government breached an affirmative duty of care owed directly to him"); *Del Rio* v. *United States*, 833 F.2d 282, 286-287 (11th Cir. 1987). Other courts have disagreed with the Fourth and Eleventh Circuits, holding that *Feres* bars claims that have their genesis in a service member's own claims based on injuries suf-

fered incident to service and concluding that the "genesis" standard precludes a claim for negligent prenatal care. See, *e.g.*, *Persons* v. *United States*, 925 F.2d 292, 296-297 (9th Cir. 1991) (reviewing cases); *Irvin* v. *United States*, 845 F.2d 126, 130-131 (6th Cir.), cert. denied, 488 U.S. 975 (1988); *Scales* v. *United States*, 685 F.2d 970, 973 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); see also Pet. 7-8 (citing cases).[2]

Resolution by this Court of that disagreement, however, would not benefit petitioners, because their claim is not based on allegations of negligent prenatal care or on analogous facts. Rather, petitioners' claim is based on a serviceman's exposure to chemicals, which allegedly resulted in birth defects in that serviceman's subsequently-conceived child. Even in the Fourth and Eleventh Circuits, petitioners' claim would be barred by *Feres*. *Romero* expressly distinguished its holding from the contrary result reached in cases such as this one, which "involv[e] an injury to the service person with consequent genetic injury to [the] offspring." 954 F.2d at 226; see also *ibid.* n.3 (citing cases that bar children's claims for damages resulting from parent's exposure to radiation); *Del Rio*, 833 F.2d at 287 n.8.[3]

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[2] Petitioners contend that the courts of appeals disagree on whether *Feres* bars "FTCA suits by [a] service member's children." Pet. 7. That statement ignores the distinction between claims alleging an independent injury to a fetus while in utero—about which some courts have disagreed (compare *Romero* and *Scales*)—and claims alleging injury to children conceived in the future based solely on allegedly harmful exposure suffered by the service-member parent.

[3] *Del Rio* did not expressly distinguish between prenatal care cases and exposure cases, as did *Romero*. The Eleventh

Petitioners argued in the courts below that *Romero*'s distinction does not apply here because their complaint did not plead any injury to Darrell Clark. See also *Monaco* v. *United States*, 661 F.2d 129, 133 (9th Cir. 1981) (rejecting similar argument), cert. denied, 456 U.S. 989 (1982). But the necessary crux of petitioners' claim is that Darrell Clark's reproductive health was impaired, resulting in his conception of a daughter with birth defects. If he had suffered no reproductive injury from his exposure to the drugs and chemicals he points to, Kennedi Clark's birth defects could not be attributed to that exposure, and petitioners' claim would fail for lack of causation. Accordingly, petitioners can cite no decision permitting an exposure case to proceed notwithstanding the *Feres* doctrine. That result flows from the absence of any independent duty by the government to the potential future offspring of service members. Decisions holding that *Feres* does not bar a civilian's independent tort claim are not supportive of petitioners' argu-

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Circuit's reasoning in *Del Rio*, however, would not extend to the exposure cases (which includes petitioners' claim here). First, the *Del Rio* court relied on the uncontroverted principle that dependents of service members are not precluded by *Feres* from bringing their own independent claims for negligent medical treatment by military personnel. 833 F.2d at 286-287. Second, the Eleventh Circuit's analysis of the rationales underlying the *Feres* doctrine focused on the relationship of the *child* to the military, which is a relevant consideration only because the court had implicitly accepted the notion that the child had an independent tort claim based on a duty owed to the child by the government (separate from any duty owed to the service member parent). See *id.* at 287. That analysis has no application in this case because Kennedi Clark had not been conceived at the time Darrell Clark was exposed to the drugs and chemicals that he alleges caused Kennedi Clark's birth defects.

ment in this case, because no civilian (then conceived or born) had a claim at the time the tort was allegedly committed (Kennedi Clark had not even been conceived until well after Darrell Clark was allegedly exposed to the drugs and chemicals at issue here).

b. With respect to Darrell Clark's contention that the *Feres* doctrine does not bar a suit predicated on a post-discharge failure-to-warn claim, the courts of appeals have uniformly barred such suits if the plaintiff asserts (as petitioners do here) that the government possessed the relevant information of potential harm to service members at the time the person originally suffered injury. Petitioners err in asserting (Pet. 8) the existence of a circuit conflict on that issue. Indeed, the three cases cited by petitioners as permitting some post-discharge failure-to-warn claims are inapposite to this case, because the facts of those cases did not involve such prior knowledge of potential harm by the government and the courts that decided them perceived no disagreement with the decisions of other courts on the question of barring a claim in those circumstances. See *M.M.H.* v. *United States*, 966 F.2d 285, 288 (7th Cir. 1992) (agreeing that "*Feres* bars suit when the government's [alleged post-discharge] failure to warn or treat the plaintiff constitutes a continuation of the earlier, noncompensable tort"); *Cole* v. *United States*, 755 F.2d 873, 876 (11th Cir. 1985); *Broudy* v. *United States*, 661 F.2d 125, 128 (9th Cir. 1981).

Thus, if the government knew of the danger at the time of the original injury to the service member, it incurs no new duty to warn merely because the service member is later discharged. See, *e.g.*, *Lombard* v. *United States*, 690 F.2d 215, 220-223 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Cole*, 755 F.2d

at 876; *Broudy*, 661 F.2d at 128 & n.6 (explaining that post-discharge failure-to-warn claims based solely on a continuing tort theory would "completely abrogate the *Feres* doctrine"). Petitioners appear to concede that their suit alleges that the government knew of the purported danger of exposure from the time Darrell Clark was exposed to the vaccines and toxins. See Pet. 4 (expert testimony would purportedly show that the government "had this information at the time").[4] Accordingly, petitioners' complaint was properly dismissed as barred by the *Feres* doctrine.

c. The decision below correctly affirmed the dismissal of petitioners' suit because exposure cases such as this one are properly within the ambit of *Feres* and its progeny. *Feres* bars claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950). As this Court has recognized, the *Feres* bar extends to claims by third parties whose injury derives from an injury suffered by the service member. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). It would be anomalous—and contrary to *Stencel*—if the United States's protection from claims for injury to service members was limited whenever a third party also suffered solely as a result of the service member's injury.

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[4] Petitioners' complaint did not include any allegation that the government should be held liable for a failure to warn, either before or after Darrell Clark's discharge from service. Thus, petitioners' argument on that issue is unsupported by the pleadings, and their assertion (Pet. 8) that the lower courts failed to reach the question is of no moment.

2. In any event, even if petitioners had identified a conflict among the courts of appeals on an issue actually presented here, this case would not be an appropriate vehicle for resolving it because the judgment below is supported by three additional alternative grounds, and petitioners have not challenged those bases for dismissal. The district court dismissed this case not solely on *Feres* grounds, but also for the independent reasons that: (1) the complaint was not timely filed because petitioners had not exhausted their administrative remedies; (2) the decision to administer certain drugs to soldiers was a policy decision within the FTCA's discretionary function exception; and (3) the claim arose out of combatant activities during time of war, and is therefore expressly excluded from coverage under the FTCA. Pet. App. 4a-8a. The court of appeals adopted the reasoning of the district court, and did not distinguish among the four bases for dismissal. *Id.* at 2a. Each of those rationales independently supports the judgment below, and petitioners' failure to challenge any of them means that petitioners would not benefit from a favorable ruling by this Court on the *Feres* issue.

a. First, petitioners' complaint was filed prematurely. The FTCA requires a claimant to file an administrative claim before bringing suit. See 28 U.S.C. 2675(a). Here, petitioners' administrative claim was denied by the United States Air Force on August 3, 1995. C.A. R.E. 18-19. Following that denial, petitioners were entitled to sue under the FTCA or, alternatively, to seek reconsideration before the administrative agency that denied the claim. See 28 C.F.R. 14.9(b).

Petitioners chose to seek reconsideration, requesting on September 28, 1995 that the Air Force recon-

sider its decision denying their administrative claim.[5] Petitioners then filed this lawsuit on February 2, 1996 (before six months had elapsed). The regulations governing FTCA claims specify that the statutory right to sue does not accrue until six months after a timely request for reconsideration of an administrative decision. 28 C.F.R. 14.9(b); see also 32 C.F.R. 842.90(b) (Air Force regulations). Thus, petitioners had no cause of action until the Air Force had been afforded the designated six month period to act on their reconsideration request. See, *e.g.*, *McNeil* v. *United States*, 508 U.S. 106, 112-113 (1993) (prematurely filed FTCA suit must be dismissed even if the plaintiff's administrative remedies are exhausted while the case is pending). Petitioners' remedy was to file suit when their FTCA cause of action accrued—*i.e.*, after their reconsideration request was denied or after the passage of six months without any decision on that request.[6] The petition does not challenge the dismissal of the complaint on that independent ground.

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[5] Petitioners' counsel sent a letter designated "Notice of Appeal," which asked the Air Force to "reconsider" its denial of petitioners' administrative claims. C.A. R.E. 20-21. Petitioners have not disputed that their letter served as a reconsideration request for purposes of 28 C.F.R. 14.9(b).

[6] Indeed, petitioners did just that, filing a substantively identical lawsuit in the district court after their administrative reconsideration request was denied. *Clark* v. *United States*, No. 4:96CV289 (E.D. Tex. 1997). That proceeding was stayed on February 5, 1997, pending the Fifth Circuit's decision in the appeal of this case. After the Fifth Circuit affirmed the judgment in this case, the district court dismissed the second suit on July 3, 1997. Petitioners have not appealed that decision.

b. Second, petitioners' claim comes within the discretionary function exception to the FTCA, and was properly dismissed for that reason as well. The FTCA expressly precludes any suit based on an agency's or employee's "exercise or perform[ance] [of] a discretionary function or duty * * *, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). As to such claims, the FTCA does not waive the sovereign immunity of the United States. See, *e.g.*, *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984).

The district court concluded that "the decision to administer certain drugs to soldiers was a policy decision." Pet. App. 7a. Petitioners' claim here derives from a contention that drugs administered by the military to its soldiers caused birth defects in children of those soldiers. Pet. 4; Pet. App. 3a-4a. The decision to administer drugs to soldiers preparing for the Persian Gulf War required the government to weigh the threat of chemical attacks against any potential inherent dangers of certain drugs that could protect soldiers from such attacks. Those and other factors that the government was required to balance were "exactly the type of 'military, technical, and social considerations'" that undergird the discretionary function exception to the FTCA. *Id.* at 7a, quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511 (1988). The court of appeals correctly affirmed the district court's dismissal of the complaint on that independent ground. Pet. App. 2a.

c. The district court also held that petitioners' claims were barred because they arose out of wartime activities by the military. Pet. App. 8a. The FTCA does not permit "[a]ny claim arising out of the combatant activities of the military or naval forces, or

the Coast Guard, during time of war." 28 U.S.C. 2680(j).

Petitioners' claims concern allegedly harmful chemical exposure sustained by Darrell Clark while he was in the military during preparation for and service in Operation Desert Storm. Pet. 4; Pet. App. 3a-4a. Petitioners have not challenged in the petition the conclusion by the courts below that the activities of Operation Desert Storm, including the preparation of soldiers for that mission, constituted "combatant activities," and those courts did not err in holding that the Persian Gulf War satisfied the combatant activities exception to the FTCA. See *Johnson* v. *United States*, 170 F.2d 767, 770 (9th Cir. 1948) ("combatant activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities"); see also *Koohi* v. *United States*, 976 F.2d 1328, 1334 (9th Cir. 1992) (congressional declaration of war not required to come within terms of statute), cert. denied, 508 U.S. 960 (1993).

Because the court of appeals properly upheld the dismissal of petitioners' complaint on those independent grounds, there would be no basis for this Court to reverse the judgment below even if it were to agree with petitioners on the *Feres* issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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